STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER KIRKWOOD,

Defendant-Appellant.

UNPUBLISHED
August 26, 2003

No. 238197
Wayne Circuit Court
LC No. 01-002099-01

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and sentenced to lifetime probation. He appeals as of right. We affirm.

Defendant first argues that his conviction should be reversed because he was arrested without probable cause in violation of his federal and state constitutional rights to be free from unreasonable arrests. We disagree. As defendant acknowledges, this issue was not raised below. Accordingly, we may grant relief with regard to this unpreserved issue only for plain error, i.e., error that is "clear or obvious" and which affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, it is neither clear nor obvious that the police lacked probable cause to arrest defendant. *Id*. Probable cause to arrest exists where the facts and circumstances within a police officer's knowledge, and of which the officer has reasonably trustworthy information, are sufficient to warrant a person of reasonable caution in believing that an offense has been or is being committed. *People v MacLeod*, 254 Mich App 222, 228; 656 NW2d 844 (2002). At trial, Officer Magdalena McKinney testified that after receiving numerous complaints of "street level narcotics" activity in the vicinity of 6634 Crane Street in the city of Detroit, she began conducting undercover surveillance of that address. On the afternoon of defendant's arrest, Officer McKinney was seated in an unmarked police car when she saw defendant and codefendant Hank Carter walking back and forth in front of 6634 Crane Street. Officer McKinney testified that she eventually saw defendant engage in a brief conversation with another man, receive "green paper currency" from him, and then go to the rear of a nearby store where he reached down to the ground and retrieved what she suspected to be narcotics. Officer McKinney indicated that she then saw defendant give the suspected narcotics to the man, who left the area.

Officer McKinney also recounted seeing Carter receive "green paper currency" from a woman then go to the "stash location" at the rear of the store where he picked up what she believed to be narcotics, which he too gave to the woman. Officer McKinney also described seeing a second man approach and engage in conversation with defendant before giving defendant money, at which point she notified the arrest team "to move in."

Given this testimony, it is at the very least neither clear nor obvious that the police lacked probable cause to arrest defendant. A person of reasonable caution may well have believed that defendant was engaged in the sale of illicit drugs based on the observations by Officer McKinney. *Id*. Moreover, Officer McKinney testified that she had made "well over" one thousand narcotic arrests following similar surveillance and that the manner in which people would walk up, engage in brief conversation with either defendant or Carter, then give the men currency and wait while one of the two retrieved items from a hidden "stash," was indicative of an illegal narcotics transaction. Because this issue was not raised below, however, the prosecution did not have an opportunity to present other evidence of matters known to the police that may have provided further probable cause to arrest defendant. This consideration further supports our conclusion that there was no plain error stemming from the trial court's failure to sua sponte provide relief based on an alleged lack of probable cause to support defendant's arrest.[1]

Moreover, as the prosecution indicates, the sole potential remedy for an illegal arrest is suppression of evidence derived from the illegal arrest, not automatic dismissal of the charges. *Lansing v Hartsuff*, 213 Mich App 338, 352; 539 NW2d 781 (1995); *People v Spencley*, 197 Mich App 505, 508; 495 NW2d 824 (1992). Thus, contrary to defendant's suggestion, even if his arrest was illegal because it was not supported by probable cause, it would not automatically follow that his conviction should be reversed or the charge dismissed. Indeed, it appears that the most critical evidence against defendant – Officer McKinney's observation of the suspicious conduct and the eventual seizure of cocaine – was not obtained as a result of defendant's arrest. In sum, defendant has not shown that he is entitled to relief on the basis of his unpreserved challenge to the validity of his arrest.

Defendant also argues that there was insufficient evidence to support his conviction. Again, we disagree. In assessing whether there was sufficient evidence to support a conviction, this Court views the evidence in a light most favorable to the prosecution to decide whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002). A conviction of possession of cocaine with intent to deliver requires proof that the defendant knowingly possessed cocaine that he intended to deliver to someone else. *People v Johnson*, 466 Mich 491, 499-500; 647 NW2d 480 (2002). However, actual physical possession is unnecessary because constructive possession may be sufficient to support a conviction. Constructive possession exists when there is "a sufficient nexus between [the] defendant and the contraband."

[1] We note that, in its argument, the prosecution refers to cocaine actually being found at the pertinent location behind the store. However, because this apparently occurred only after defendant's arrest, we place no reliance on this factor in considering this issue.

Id. at 500. Possession includes control of the disposition of drugs and may be either joint or exclusive. *Id.*

In addition to her testimony above, Officer McKinney testified at trial that after ordering the arrest team "to move in" she told Officer John Dembinski of the suspected "narcotics stash" behind the store. Officer Dembinski testified that behind the store he found seven zip lock packets containing a substance he believed to be cocaine, which he placed in a "lock seal folder." A forensic scientist with the Detroit Police Department testified that he analyzed one of the seven items in that lock seal folder and determined that it was in fact cocaine weighing .08 grams. On the basis of this testimony, as well as Officer McKinney's earlier testimony regarding defendant's conduct, a rational trier of fact could have determined beyond a reasonable doubt that defendant was engaged in the sale and delivery of the substance found by Officer Dembinski behind the store, which defendant knew to be cocaine. See *People v Wolfe*, 440 Mich 508, 526; 489 NW2d 748, mod 441 Mich 1201 (1992) (possession with intent to deliver can be established by circumstantial evidence and the reasonable inferences arising from that evidence). A rational trier of fact could further determine beyond a reasonable doubt that defendant at least constructively possessed the cocaine in question, regardless of whether he did so exclusively or jointly with Carter, because he was exercising control over it in connection with his efforts to sell it. Thus, there was sufficient evidence to support defendant's conviction of possession with intent to deliver less than fifty grams of cocaine.

We affirm.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell